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Col Wortham

TAB 25

DEPARTMENT OF STATE
THE LEGAL ADVISER

September 10, 1965

~~CONFIDENTIAL~~

TO:
L - Mr. Leonard C. Meeker
UNP - Mr. Paul Jones
G/PM - Mr. Raymond Garthoff
SCI - Mr. T.H.E. Nesbitt
EUR/SOV - Mr. Vladimir Toumanoff
GER - Mr. Emmet Ford
FE - Miss Louise McNutt
L/C - Mr. George W. Spangler
L/T - Mr. Charles Bevans
L/EUR - Mr. Herbert Reis
ACDA/GC - Mr. Alan Neidle
✓ DOD/ISA - Col. Marshall Sanders
NASA/GC - Mr. Arnold Frutkin
Mr. Walter Sohier

FROM: L/UNA - H. Rowan Gaither N.R.G.

SUBJECT: Outer Space Liability Agreement

Enclosed are revised copies of the Liability position paper and the draft Liability agreement, both incorporating changes agreed to at the Interdepartmental meeting held on Wednesday.

Note that Resolution 1962 (Declaration of Legal Principles), not included in these documents, will appear as Annex B. Note also that Annex A, the draft agreement, has been prepared so that the Delegation may readily perceive the differences and addition to the last public United States proposal (revised) published as a U.N. document on October 20, 1964. Prior to the meeting, a clean draft agreement (not marked confidential) will be prepared which can be handed out to the Subcommittee.

I would appreciate hearing your changes, if any, prior to close of business on Tuesday, September 14.

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L/UNA:HRGaither:mab

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POSITION PAPER
UNITED STATES DELEGATION

~~CONFIDENTIAL~~
September 10, 1965

UNITED NATIONS COMMITTEE ON THE PEACEFUL USES OF OUTER SPACE LEGAL SUBCOMMITTEE, IV SESSION
SEPTEMBER 20, 1965
LIABILITY FOR DAMAGE CAUSED BY THE LAUNCHING OF OBJECTS INTO OUTER SPACE

INTRODUCTION

This paper deals with the problems of negotiating an agreement on liability from damage resulting from the launching of an object into outer space. The underlying documentation will be found in United Nations Document A/AC.105/21, October 23, 1964, and Add. 1, Report of the Legal Subcommittee on the Work of the Second Part of its Third Session.

This position paper may be used in consultations with friendly members of the Legal Subcommittee prior to the September 20 meeting, subject to appropriate authorization.

OBJECTIVE

The objective is to secure an international agreement on liability acceptable to the United States.

STRATEGY

The Delegation should work towards the development by the Legal Subcommittee of a convention on liability, the substance of which is similar to the text attached at Annex A.

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The Annex A text is a composite of the draft proposed by the United States on October 5, 1964, language approved for the use of the Delegation during the second half of the Subcommittee's third session, and minor drafting and working changes. Should the drafting stage be reached, the United States draft should remain the center of attention throughout the negotiations, rather than the Hungarian text. The Belgian text, to the extent possible, should be treated as a helpful contribution.

GOVERNING LEGAL PRINCIPLES

The stimulus as well as the governing principles of international law on which a liability agreement will be based are to be found in the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, adopted unanimously by the General Assembly on December 13, 1963, as resolution 1962 (XVIII). (This resolution is annexed.)

NEGOTIATING PROCEDURE

The Legal Subcommittee has now completed two readings of draft proposals for the liability convention. The area of disagreement remains rather wide on the substantive as well as on some procedural provisions. Accordingly, the

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Delegation might wish to prevail upon the Subcommittee to direct initial discussion toward outstanding problems, rather than another reading of drafts. Work on a draft text would be substantially facilitated by prior agreement on the major outstanding issues. The major outstanding issues are noted below.

In view of the slight modifications made to the last revised draft, the Delegation is authorized to present the annexed draft to the Subcommittee. The timing and manner of that presentation is left to the discretion of the Delegation.

As negotiations are successfully completed on the various problems, the Delegation may wish to suggest that either a drafting group be set up or the Secretariat be requested to formulate the text of the agreement.*

SUBSTANTIVE PROVISIONS

I. Scope of liability. Most delegations now agree that the launching state should be absolutely liable.

Disagreement

*The Delegation may also wish to suggest to the Secretariat that when reporting on the work of the Legal Subcommittee, they identify the delegation with the view expressed. In the last report (A/AC.105/21), the various views were noted but not identified with any particular delegation. It would be far more helpful if that identification were made.

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Disagreement has focused on exculpation provisions. The United States draft (Article II, paragraph 2) provides that compensation may be wholly or partially extinguished if damage results from willful or reckless act or omission on the part of the injured party. The Delegation should oppose the "unlawful activities" concept contained in the Hungarian draft which would provide for full liability if the object was launched for "unlawful purposes". The Delegation might point out that this concept has not been defined, and that its inclusion would unnecessarily raise a number of contentious issues. Without an acceptable definition, the concept is unacceptable and we do not want to stimulate discussion of term "unlawful activities", the effect of which could result in restriction of United States activities in outer space.

II. Measure of Damages. The United States continues to prefer a measure of damages which will ensure uniformity of result. Neither the law of the injured State (see Belgian text Articles I and V) nor the law of the launching State (the Bloc countries), the other proposals advanced, would provide for such uniformity due to the variety of laws of the various legal systems which could be invoked. The

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Delegation should continue to press for acceptance of a measure determined in accordance with "applicable principles of international law, justice and equity." Should the Delegation find this concept more acceptable by deleting the phrase "justice and equity", it may do so.

The United States proposal is designed to ensure uniformity in the determination of damages by reference to international law, rules of which have been worked out by decisions of arbitral tribunals and by international practice. When a case appears where the circumstances are unprecedented and "principles of international law" are insufficient, "principles of equity and justice" may be looked to.

In determining the amount of compensation to be paid for personal injury in international law and practice, it is customary to take into account the nature and extent of the bodily injury, pain and physical suffering, loss of earnings and of earning capacity, reasonable medical and other expenses, and loss of time from gainful employment. In death claims, it is proper to take into account the amount which the decedent, had he not been killed, would probably have contributed to members of his family, the

value

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value of personal services the decedent would have rendered to members of his family, such as guidance, training, and supervision, and mental suffering, shock, and the like which is sustained by members of the decedent's family. In calculating damages for the destruction of and damage to property the factors taken into account are generally the cost of the property, date of acquisition, subsequent improvements and repairs, the fair market value of the property or if no fair value exists, the fair value of the property, the difference between the value of the property before the damage and the value of the property in its damaged condition, and the loss of the use of the property.

Specifically, the sources of such law, in addition to international legal writers such as Hackworth and Whiteman, are the various arbitral tribunals: United States-Panama Claims Arbitration; Special Mexican Claims Commission; the Mixed Claims Commission, United States and Germany; American-Turkish Claims Settlement.

Should the Delegation wish to demonstrate the detail in which some of the arbitration commissions have set forth factors in estimating damages, it may refer to factors considered by the Mixed Claims Commission, United States and Germany

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Germany (quoted from V Hackworth, "Digest of International Law", pp. 749-751):

"(a) the age, sex, health, condition and station in life, occupation, habits of industry and sobriety, mental and physical capacity, frugality, earning capacity and customary earnings of the deceased and the uses made of such earnings by him;

"(b) the probable duration of the life of deceased but for the fatal injury, in arriving at which standard life-expectancy tables and all other pertinent evidence offered will be considered;

"(c) the reasonable probability that the earning capacity of deceased, had he lived, would either have increased or decreased;

"(d) the age, sex, health, condition and station in life, and probable life expectancy of each of the claimants;

"(e) the extent to which the deceased, had he lived, would have applied his income from his earnings or otherwise to his personal expenditures from which claimants would have derived no benefits;

"(f) in reducing to their present cash value contributions which would probably have been made from time to time to claimants by deceased, a 5% interest rate and standard present-value tables will be used;

"(g) neither the physical pain nor the mental anguish which the deceased may have suffered will be considered as elements of damage;

"(h) the amount of insurance on the life of the deceased collected by his estate or by the claimants will not be taken into account in computing the damages which claimants may be entitled to recover;

"(i) no

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"(i) no exemplary, punitive, or vindictive damages can be assessed."

III. International Organizations. International organizations pose two major questions: (1) how to treat these organizations in the text, and (2) how liability incurred by such an organization shall be borne by constituent parties in the event of default by the organization. The United States text in Article III provides for an international organization to accept and comply with the provisions of the Convention by a declaration which shall also contain a statement as to the method by which any liability of the organization shall be borne by the constituent member states and the manner in which claims shall be presented.

The Delegation should continue to support Article III. However, the Delegation may accept the term "intergovernmental organizations" as a substitute for "international organizations" (as suggested by Canada) if considered desirable.

If there is general agreement, the Delegation may accept the (Australian) proposal that at least one member of an international organization must be a contracting party to the Convention before the organization may be permitted

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permitted to deposit a declaration. Therefore, there will be at least one contracting party against whom a presenting State may present a claim if the international organization defaults.

IV. Joint and Several Liability. Under the United States text (Article II, paragraph 3), the presenting State may proceed against one State or several jointly (i.e., simultaneously). The phrase "for the total amount of damages" has been inserted in this article in order to prevent the presenting State from bringing separate actions against several states successively for amounts less than the total damages. Once a figure is arrived at, the presenting State may attempt to collect in any manner since each State involved would be liable for the full amount. Successive claims, however, would not be permitted; i.e., the presenting State may not establish liability successively, but it may seek to collect successively up to an aggregate which shall not exceed the total amount which would be payable if only one respondent state were involved.

At the last session, little agreement was evidenced in this area, in part due to conceptual differences based on differing legal systems and an inability to understand

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the concepts of joint, joint and several, and successive liability which may vary slightly in effect from one legal system to another. In an effort to resolve the impasse in this area, the Delegation should explain in detail the practical application of the United States proposal.

(Also connected with this problem is the joint liability of joint ventures. See V below.)

V. Definition of "Launching State". There was considerable disagreement over the extent of liability which participants in a joint undertaking should assume. Hungary's concept that all participating states should be liable was thought by many to be too broad. The United States, in an effort to specify the extent of participation which would incur liability, expanded the definition of "launching State" (Article I, paragraph c) to include that State "...which exercises control over the orbit or trajectory of an object". This applies to the control of the object, not to superficial control of deploying antennae, adjusting aspect, etc. It would apply to the State which deorbits the object.

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In the Summary of views expressed in Working Groups I and II (A/AC.105/21/Add. 2, 21 May 1965, pages 42-44), the Secretariat reported the United States Delegation as stating that "to 'procure the launching' would mean to defray the cost of the actual launching. A State, therefore, which merely furnishes a space object for the launching by another State, would not be regarded as having procured the launching." The Secretariat then went on to give illustrative examples one of which stated that if State A furnished a rocket to State B and State B launches from its territory, only State B is liable. This is in error and the Delegation will wish to set the record straight.

The United States leans toward the concept of public national responsibility. If there is substantial governmental participation (not private participation by its nationals), the government should share responsibility. Accordingly, if State A furnishes the rocket and State B launches from its own territory, both States A and B would share responsibility--State A because it "procures" the launch, State B because its territory was used.

VI. Damage

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VI. Damage suffered by Nationals. The United States draft (Article V) provides that a State shall not be liable for damage suffered by its own nationals. The Hungarian proposal (Article IX, paragraph 3) is similar in effect. We do not wish to enter into an arrangement by which a foreign state could press the claim of a United States national against the United States Government. Such an arrangement would be potentially embarrassing. There are adequate arrangements already in effect to give United States nationals appropriate recourse against the United States Government in these cases. Further, any party to the agreement may, through unilateral legislative action provide that the principles of the agreement will apply to claims against it by its own nationals.

VII. Sequestration. The U.S.S.R. proposed a provision that a claim for compensation should not constitute grounds for the sequestration of space vehicles. The Delegation, at its discretion, may agree to this concept which would benefit the space Powers. The following language, substantially similar to the Soviet proposal, is suggested:

> "Claims for compensation for damage caused by the launching of an object into outer space shall not constitute grounds for the sequestration of such object."

PROCEDURAL

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PROCEDURAL PROVISIONS

I. Settlement of Disputes. The United States draft Article X provides for compulsory jurisdiction of the International Court of Justice. The Bloc countries, traditionally opposed to that concept, have refused to accept it. Instead, they have proposed settlement of disputes by "traditional methods of negotiation". The United Kingdom supported our Article X but preferred arbitration procedures for disputes of a technical nature. The United States would like a compulsory jurisdiction clause, however, the claims commission envisioned under Article VII is considered of greater value, and the Delegation may delete Article X when it finds it tactically advantageous to do so.

The Delegation should strongly oppose the use of a method of settlement such as Article XII of the Hungarian draft which merely calls upon States to "agree upon an international arbitration procedure or any other method of settlement acceptable to both States." This is illusory since if one State refuses to agree to a suggested method of settlement, the dispute cannot be resolved.

II. Limitation of Liability. The United States and Hungarian texts provide for a limit of liability without setting

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setting a figure. Delegations favoring a limit are: U.K., Canada, Italy, the U.S.S.R., Bulgaria, Czechoslovakia, and Hungary; Mexico, Lebanon and India reserved judgment, depending on the amount; France, Japan, and Argentina were opposed. At the October meeting, Canada suggested a figure of 100 million, but said "persons" had suggested privately that this was too high and that twenty-five million was enough; Italy thought the maximum should be no higher than 100 million, could accept twenty-five million; India thought the former figure not high enough; the Bloc countries expressed the view that a study should be made to set a figure; and the U.S.S.R. suggested a separate convention might be needed to cover large costs of nuclear damages, Japan's primary concern. The Delegation should not take the initiative in setting any figure, but should let another country, perhaps Italy, take the lead. The Department will wish to clear any figure before the Delegation accepts it. The Delegation should not volunteer the information, but if asked may say that the limitation of liability contained in the Price-Anderson Act, with regard to nuclear installations in the United States is $500 million.

III. Statute

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III. Statute of Limitations. Article IV, paragraph 4, provides for a one year statute of limitations in which notice of a claim is to be presented. The time during which a claim may be documented is not specified, however, under Article VII, after the date documentation is completed, the presenting State must wait one year before it can request a claims commission.

The Delegation should oppose any attempt to have the statute start running from the date the respondent State is identified. Such a proposal would extend the statute excessively and could create difficult litigation regarding the precise date the respondent is identified. (The date of identification was an Austrian proposal which was contrary to both United States and Hungarian drafts.)

IV. Final Clauses. Provision for revision conference, withdrawal, and entry into force, should not cause much discussion. The Bloc countries will press for the inclusion of an "all States" formula for accession. The United States has proposed to the Soviets the Test Ban formula for both accession and depositary clauses in the Assistance and Return Agreement, making it plain that other clauses in that agreement had to be retained per our draft. However, the Delegation should not indicate willingness to adopt the Test Ban formula for the liability agreement.

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ANNEX A
September 10, 1965

CONVENTION CONCERNING LIABILITY FOR DAMAGE CAUSED BY THE LAUNCHING OF OBJECTS INTO OUTER SPACE

The Contracting Parties,

Recognizing that activities in the peaceful exploration and use of outer space may on occasion result in damage,

Recalling General Assembly resolution 1962 (XVIII), entitled "Declaration of Legal Principles Governing Activities of States in the Exploration and Use of Outer Space",

Seeking to establish a uniform rule of liability and a simple and expeditious procedure governing financial compensation for damage,

Believing that the establishment of such a procedure will contribute to the growth of friendly relations and cooperation among nations,

Agree as follows:

ARTICLE I

For the purposes of this Convention

a. "Damage" means loss of life, personal injury, or destruction or loss of, or damage to, property.

b. The term

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b. The term "launching" shall include attempted launchings.

c. "Launching State" means a Contracting Party, or international organization which has transmitted a notification to the Secretary-General under Article III, paragraph 1, of this Convention, which launches or procures the launching of an object into outer space or whose territory or facility is used in such launching, or which exercises control over the orbit or trajectory of an object.

d. "Presenting State" means a State which is a Contracting Party, or international organization which has transmitted a notification to the Secretary-General under Article III, paragraph 1 of this Convention, which presents a claim for compensation to a Respondent State.

e. "Respondent State" means a launching State, or international organization which has transmitted a notification to the Secretary-General under

/Article III,

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Article III, paragraph 1 of this Convention, from which compensation is sought by a Presenting State.

ARTICLE II

1. The launching State shall be absolutely liable and undertakes to pay compensation to the Presenting State, in accordance with the provisions of this Convention, for damage on the earth, in air space, or in outer space, which is caused by the launching of an object into outer space, regardless of whether such damage occurs during launching, after the object has gone into orbit, or during the process of re-entry, including damage caused by apparatus or equipment used in such launching.

2. If the damage suffered results either wholly or partially from willful or reckless act or omission on the part of the Presenting State, or natural or juridical persons it represents, the liability of the launching State to pay compensation under paragraph 1 of this Article shall, to that extent, be wholly or partially extinguished.

3. If under this Convention more than one launching State would ~~shall~~ be liable ~~to pay compensation for damage in relation to any one incident under this Convention~~, the / Presenting

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Presenting State may proceed against any one or all such States individually or jointly for the total amount of damages, and once the liability is agreed upon or otherwise established, each such State shall be liable to pay ~~the full~~ that amount ~~of such compensation~~, provided that, in no event shall the aggregate of the compensation paid exceed the amount which would be payable under this Convention if only one Respondent State were liable.

4. The compensation which a State shall be liable to pay for damage under this Convention shall be determined in accordance with applicable principles of international law, justice, and equity.

ARTICLE III

1. If an international organization which conducts space activities transmits to the Secretary-General of the United Nations a declaration that it accepts and undertakes to comply with the provisions of the present Convention, all the provisions, except Articles X, XIII, XIV, and XV, shall apply to the organization as they apply to a State which is a Contracting Party.

2. The declaration referred to in paragraph 1 of this Article shall contain a statement as to the financial share ~~manner~~ in which any liability incurred by the international organization shall be borne and the method of payment by constituent members once the amount of compensation

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and the manner in which claims shall be presented to it has been agreed upon or otherwise established pursuant to Arricle VII.

3. The Contracting Parties to the present Convention undertake to use their best endeavors to insure that any international organization which conducts space activities and of which they are constituent members is authorized to make and will make the declaration referred to in paragraph 1 of this Article.

4. In the event that an international organization fails to pay within one year of the date on which compensation has been agreed upon or otherwise established pursuant to Article VII, each member of the organization which is a Contracting Party shall, upon service of notice of such default by the Presenting State within three months of such default, be liable for such compensation in the manner and to the extent set forth in Article II, paragraph 3.

ARTICLE IV

1. A Contracting Party which suffers damage envisioned in Article II, paragraph 1, ~~as a result of the launching of an object into outer space~~, or whose natural or juridical persons suffer such damage, may present a claim for

 / compensation

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compensation to a Respondent State.

2. A Contracting Party may also present to a Respondent State a claim of any natural person, other than a person having the nationality of the Respondent State, ~~permanently~~ residing in its territory. However, a claim of any individual claimant may be presented by only one Contracting Party.

3. A claim shall be presented through the diplomatic channel. A Contracting Party may request another State to present its claim and otherwise represent its interest in the event that it does not maintain diplomatic relations with the Respondent State.

4. Notice of a claim must be presented within one year of the date on which the accident occurred or, if the Presenting State could not reasonably be expected to have known of the facts giving rise to the claim, within one year of the date on which these facts became known.

5. When, under Article II, paragraph 3, a presenting State elects to proceed against one of several States liable under this Convention, that Respondent State may notify those States not notified by the Presenting State.

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ARTICLE V

A State shall not be liable under this Convention for damage suffered by its own nationals.

ARTICLE VI

1. The presentation of a claim under this Convention shall not require exhaustion of any remedies in the Respondent State which might otherwise exist.

2. If, however, the Presenting State, or any natural or juridical person whom it might represent, elects to pursue a claim in the administrative agencies or courts of the Respondent State or pursue other international remedies, ~~it~~ the Presenting State shall not be entitled to pursue ~~a~~ such claim under this Convention.

ARTICLE VII

1. If a claim is not settled within one year from the date documentation is completed, the Presenting State may request the establishment of a commission to decide the claim. In such event, the Respondent State and the Presenting State shall each promptly appoint one person to serve on the commission, and a third person, who shall act as chairman,

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shall be appointed by the President of the International Court of Justice. If the Respondent State fails to appoint its member within three months, the individual appointed by the President of the International Court of Justice shall constitute the sole member of the commission.

2. No increase in the membership of the commission shall take place where there is more than one Presenting State or Respondent State jointed in any one proceeding before the commission. The Presenting States so joined may collectively appoint one person to serve on the commission in the same manner and subject to the same conditions as would be the case for a single Presenting State. Similarly, where two or more Respondent States are so joined, they may collectively appoint one person to serve on the commission in the same way.

3. The commission shall determine its own procedure.

4. The commission shall conduct its business and arrive at its decision by majority vote.

5. The decision of the commission shall be rendered expeditiously and shall be binding upon the parties.

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6. The expenses incurred in connection with any proceeding before the commission shall be divided equally between the parties in the proceeding.

ARTICLE VIII

Payment of compensation shall be made in a currency convertible readily and without loss of value into the currency of or used by the Presenting State.

ARTICLE IX

The liability of the launching State shall not exceed $_____ with respect to each launching.

ARTICLE X

Any dispute arising from the interpretation or application of this Convention, which is not previously settled by other peaceful means of their own choice, may be referred by any Contracting Party thereto to the International Court of Justice for decision.

/ ARTICLE XI

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ARTICLE XI

1. A Contracting Party may propose amendments to this Convention. An amendment shall come into force for each Contracting Party accepting the amendment on acceptance by a majority of the Contracting Parties, and thereafter for each remaining Contracting Party on acceptance by it.

2. After this Convention has been in force five years a revision conference may be called upon the request of a majority of Contracting Parties.

ARTICLE XII

A Contracting Party may give notice of withdrawal from this Convention five years after its entry into force by written notification to the Secretary-General of the United Nations. Such withdrawal shall take effect one year from the date of receipt of the notification by the Secretary-General. ~~Such withdrawal shall not relieve~~ A State shall not be relieved of any obligation or liability arising before withdrawal becomes effective.

ARTICLE XIII

The Convention shall be open for signature by States Members of the United Nations or of any of the specialized agencies or Parties to the Statute of the International Court of Justice, and by any other State invited by the General

 / Assembly of

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Assembly of the United Nations to become a party. Any such State which does not sign this Convention may accede to it at any time.

ARTICLE XIV

This Convention shall be subject to ratification or approval by signatory States. Instruments of ratification or approval and instruments of accession shall be deposited with the Secretary-General of the United Nations.

ARTICLE XV

This Convention shall enter into force thirty days following the deposit of the fifth instrument of ratification, approval or accession. It shall enter into force as to a State ratifying, approving, or acceding thereafter upon deposit of its instrument of ratification, approval, or accession.

ARTICLE XVI

The Secretary-General of the United Nations shall inform all States referred to in Article XIII of signatures, deposits of instruments of ratification, approval, or accession, the entry into force of this Convention, proposals

/for amendments,

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for amendments, notifications of acceptances of amendments, requests for the convening of revision conference, and notices of withdrawal.

ARTICLE XVII

This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies to each of the States mentioned in Article XIII.